

05-722...4-2005

No. _____

OFFICE OF THE CLERK

**In the
SUPREME COURT of the UNITED STATES**

DAVID LAMBERTSEN

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Were David Lambertsen's substantive rights under U.S. Constitution, Amendments Five and Six violated when, under a mandatory Sentencing Guidelines regime, the Court enhanced his custodial sentence based upon "relevant conduct" statements presented to the Court by the United States Probation Office and found to be "facts" by the Court by a preponderance of the evidence?
2. Were David Lambertsen's rights under the Confrontation Clause, U.S. Const., Amendment Six, violated (a) when the trial Court relied on hearsay testimony from the probation officer concerning monetary loss; and (b) when the Court used this hearsay evidence to enhance Mr. Lambertsen's sentence under mandatory sentencing guidelines?
3. Did the lower Court err when it decided United States v. Booker, 125 U.S. 738 (2005), which developed longstanding, substantive Constitutional rights and Supreme Court precedent, did not apply to David Lambertsen's sentencing enhancements because he raised his issues in a timely-filed motion pursuant to 28 U.S.C. §2255, and not during his direct appeal?
4. Were David Lambertsen's rights to effective assistance of counsel violated when his attorney failed to object to a jury instruction that suggested the jury *should* find him not guilty of conspiracy if they had reasonable doubt, instead of instructing the jury it *must* find Lambertsen not guilty if they had reasonable doubt?

- a. If so, did such erroneous jury instruction prejudice Mr. Lambertsen, as evidenced by the fact that the jury found Mr. Lambertsen not guilty of the underlying charge of mail fraud but guilty of conspiracy to commit mail fraud?

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CITATIONS OF OPINIONS AND ORDERS ENTERED IN THIS CASE

Direct Appeal

United States of America v. Donald Sims and David Lambertsen, 02-2092 & 02-2781 (7th Cir. May 29, 2003)

Orders concerning motion filed under 28 U.S.C. 2255 in the District Court

David Lambertsen v. United States of America, 3:04-CV-327 (Northern District of Indiana South Bend Division)

- *Entered* January 24, 2005 - The Court denied the motion with prejudice on with respect to every claim except the Blakely/Booker claim.
- *Entered* March 4, 2005 – The District Court denied the Motion for a Certificate of Appealability

Order Concerning Motion for Certificate of Appealability in the Circuit Court

David Lambertsen v. United States of America, 05-1708 (7th Circuit Decided July 7, 2005) Mandate issued on August 29, 2005.

JURISDICTIONAL STATEMENT

David Lambertsen filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. §2255 in the Federal District Court for the District of Indiana, South Bend Division. When his motion was denied, he sought a certificate of appealability from the Seventh Circuit Court of appeals. The Seventh Circuit denied his request for a

certificate of appealability. He now petitions the United States Supreme Court for a writ of certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

Amendment V of the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI of the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTES

18 U.S.C. §1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be

delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. §1342. Fictitious name or address

Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. §371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to

effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT OF THE CASE

David Lambertsen was indicted for mail fraud under 18 U.S.C. §1341 and 18 U.S.C. §1342 and conspiracy to commit mail fraud under 18 U.S.C. §371. After a jury trial, he was acquitted of the mail fraud but convicted of the conspiracy to commit mail fraud. As evidenced by their questions, the jury was unsure of the level of intent needed in order to find Lambertsen guilty of conspiracy.

Under the United States Sentencing Guidelines, the base offense for theft crimes is a level 6. For a defendant in a criminal history category 1, this translates to 0 to 6 months of incarceration. However, Lambertsen received multiple enhancements which increased his sentence to sixty months – the statutory maximum.

One of Lambertsen's enhancements was for *obstruction of justice* based on the trial Court's determination that Lambertsen most likely perjured himself when his testimony differed from the testimony of one of the government's witnesses. This fact was not given to the jury. Nor was it found beyond a reasonable doubt.

Lambertsen also received increased penalties based on the testimonial hearsay of the probation officer concerning the monetary value of the loss incurred by the

alleged victims. At no point was Lambertsen given the opportunity to cross exam these witnesses.

None of the facts which led to these enhancements were found by a jury or found beyond a reasonable doubt. Instead, they were based in large part on Mr. Lambertsen's PSI, the probation officer's conversations with the alleged victims, and the trial Court's feeling concerning Lambertsen's credibility.

After Lambertsen lost his direct appeal, he filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. §2255. While his motion was pending, this Court decided United States v. Booker, 125 U.S. 738 (2005).

The District Court made a determination that *Booker* does not apply to motions filed under 28 U.S.C. §2255 (a fact not yet decided by this Court) and denied Lambertsen's motion. The Seventh Circuit denied Lambertsen's Motion for Certificate of Appealability.